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No. 339

In the

Supreme Court of the United States

OCTOBER TERM, 1956

JOE GIBSON,
Petitioner,

v.

PHILLIPS PETROLEUM COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 232 Fed. 2d 13.

QUESTIONS PRESENTED

1. Did Respondent breach any duty it owed to Petitioner?

2. Did Petitioner voluntarily expose himself to the danger which he had created, and thereby assume the risk with which he became involved?

3. Did Petitioner so fail to exercise care for his own safety as to make his negligence the sole or proximate cause of his accident?

STATEMENT OF THE CASE

Petitioner obtained judgment against Respondent in the trial court based solely on the claim submitted to the jury that Respondent had failed to furnish Petitioner, an employee of an independent contractor, with a safe place to work (R. 321-322), the claim which Petitioner himself had refuted by his testimony (R. 77, 80, 81).

In Respondent's appeal from the trial court judgment, the Fifth Circuit Court of Appeals held that the uncontradicted proof, including that from Petitioner, disclosed that Respondent had violated no duty it owed to Petitioner; that the doctrine of *volenti non fit injuria* was in bar of Petitioner's recovery; and, that it was actually Petitioner's failure to take any precautions or observe any care toward his safety which proximately caused his accident and injuries. Accordingly the Court of Appeals reversed the trial court judgment and rendered judgment in favor of Respondent.

Petitioner, admittedly, was the employee of an independent contractor who had been employed to convert a "mud" house to a "dog" house. Welding work only was involved (R. 70), and the contractor and Petitioner, his skilled and experienced employee, had commenced completion work when accident occurred.

The place of work which was furnished by Respondent was a flat piece of ground (R. 7) well removed from a drilling location where an oil well was being drilled (R. 76). There was nothing hazardous about the place of work

(R. 80). It was the work being performed and more especially the improper use of a barrel, one which Petitioner selected in preference to a standing bucket furnished by Petitioner's contractor employer, that caused the injuries. Petitioner testified that his place of work had nothing to do with his accident (R. 81).

The day of accident Petitioner came to his job location with his employer to there "cut out" a piece of conduit pipe which was over-head. This work would have required but two or three minutes (R. 95), and then the converted mud house could have been moved into to become a part of the nearby derrick. Petitioner's employer intended to do this work himself, and this employer had provided a bucket to stand on to do the work just overhead. The contractor left the work place for a moment to find his welding glasses. In the few minutes of his absence Petitioner came upon the scene and decided to do the work. He found the bucket in position to be of an inadequate height. He therefore went from the porch toward the oil well drilling nearby and picked up an unexamined empty barrel (R. 102) and carried it back to where the bucket was. He put the barrel of his selection in position by the bucket and then climbed on top of "his" barrel (R. 106). He commenced his welding work and explosion occurred.

Petitioner testified he had had varied and long experience around oil wells. He knew that the drilling of such wells required fuel for drilling operations. He knew that fuel gasoline, kerosene and oil would be brought to the

drilling location in barrels, and that full and empty gasoline, kerosene and oil barrels were to be expected to be found around or near any drilling well location (R. 67). He knew how dangerous it was to do what he did (R. 68) and he testified he knew that if he did as he did an explosion would occur (R. 68, see also pp. 90, 104). Petitioner testified that although he could have examined the barrel of his selection, he did not attempt to look at the barrel to determine its former contents, nor did he smell of it to determine what it had held (R. 104). He but put the barrel in his use without making any test of it at all (R. 106) and with full knowledge of how dangerous it was for him to do what he was doing (R. 68).

The barrel which exploded did not belong to Respondent. It was owned by Johnson Brothers (R. 248, 154, 161, 172) who supplied fuel for the power in the drilling rig. It was not furnished to Petitioner for his use. Petitioner "saw this barrel" and "went and got it" and put it in position and use "without making any test of it at all" (R. 106). It was Petitioner's claim that on other occasions Respondent had furnished something on which to stand. The standing place, when furnished, had been safe, but on the day of accident Petitioner testified no request of any kind had been made of Respondent (R. 106). Barrels which belonged to Respondent's employer (R. 201, 205, 206, 209, 230) and which were known to be safe (R. 203) and which he had before used to stand on, were but a few feet away, by the side of the building—where Petitioner knew them to be (R. 101)—when he went away from them, that is in a different

direction than toward them, and "saw this barrel and went and got it" and "put it in its position without making any test of it at all" (R. 106). Petitioner walked away from the "dog" house and away from the barrels he had used before and walked toward the derrick to pick up the barrel of his selection. In doing so he did not contend he thought he was picking up the barrel which had supported his platform in derrick work of the day before (R. 92). Because of testimony that he exercised no care for his own safety, the Court of Appeals held: "* * * it is clear that he took no care whatsoever" and reversed and rendered judgment.

Because Petitioner was experienced in the work he was doing (R. 66) and testified he had knowledge of the every danger involved (R. 67, 68, 90) and offered no evidence in refutation of the testimony so given, and because Petitioner testified he did not need warnings (R. 68), the court held Respondent violated no duty and that Petitioner had voluntarily encountered the danger.

THE DECISION BELOW IS CLEARLY CORRECT

1. Respondent Violated No Duty It Owed to Petitioner

Petitioner was an employee of an independent contractor, not an employee of Respondent (R. 3). The duty to furnish Petitioner with a safe place to work was a duty imposed by law upon the contractor-employer Bars and no such duty was imposed upon Respondent. *Harrison v. Harrison (Tex. Civ. App. 1937, 100 S. W. 2d 780, at page 783;*

Mender v. Bryant (Tex. Civ. App. 1949), 225 S. W. 2d 877; 38 Amer. Jur. par. 18, page 661. Therefore there was no proper legal basis for the jury finding that Respondent had failed to provide Petitioner with a safe place to work. This was the only issue submitted to the jury on which verdict was to be permitted in his favor (R. 321-322).

At most, the duty owing by Respondent to Petitioner was the duty owing by an owner or occupier of premises to an invitee, that is, to warn of dangers of which it knew or should have known and of which the invitee (Petitioner) did not know or should not have known. No duty is imposed upon the employer of an independent contractor to give warnings to a contractor's employees of danger of which such employee knows. *McKee v. Patterson (Tex. Sup. Ct. 1954), 271 S. W. 2d 391,* numbered paragraph (2) pages 393-394.

Petitioner's testimony was that he had long and varied experience in doing the work being done (R. 66); that he knew of the dangers with which he became involved (R. 67); that he knew that if he did as he did around an empty kerosene barrel "it would probably blow you sky high" (R. 90). It was under these admissions that the court held that since Petitioner's "* * * own testimony, by which he is bound, clearly established that he was also aware of the danger involved * * * and * * * fully appreciated the danger * * * appellant (Respondent) breached no duty to him" (pages 10-11 Court's Opinion, third from last paragraph thereof).

2. The Doctrine of Volenti Non Fit Injuria is in Bar of Petitioner's Claim

The court below found that Petitioner's own testimony "by which he is bound, clearly established that he was also aware of the danger involved in using drums which might be found on the premises of an active drilling rig and that he fully appreciated the danger of using a cutting torch around a drum which had had either gasoline or kerosene in it, and yet he picked up a drum on the premises, concededly not in the identical place where he had previously left a drum, and used it without any examination whatever to determine its former contents and without even observing whether the openings therein were closed." (See R., pp. 67, 68, 90, 92, 101, 102, 103, 104, 105, 106, 107, 111, 112.) On these findings, the Court of Appeals concluded that Petitioner had made the choices which were made and voluntarily had encountered his danger.

In Texas, the law as declared by the Supreme Court of the state, is: "* * * one cannot recover for injuries sustained while voluntarily exposing himself to a danger which he either does or should fully realize and appreciate." *McKee v. Patterson (Tex. Sup. Ct., 1954), 271 S. W. 2d 391*, numbered paragraph 3, page 394. The Petitioner's admissions clearly establish the plea of voluntary exposure to and assumption of risk which was plead in bar of Petitioner's claim (R. 19, Ninth Defense).

3. Petitioner's Testimony that He Exercised No Care for His Own Safety Compelled the Court of Appeals to Find That It Was Petitioner's Negligence which Solely and Proximately Caused the Injuries He Received

Petitioner, in trial, unhesitatingly admitted that he exercised no care for his own safety (R. 102, 103, 104, 105). His testimony was clear and uncontradicted that he "went and got" the barrel of his choice (R. 106), all with actual knowledge that in the event he "lit a torch around a tank that had gasoline or kerosene in it, it would probably blow you sky high" and made no tests of it (R. 90, 68).

In Texas, the rule is that contributory negligence is an absolute defense in a case such as this. 30-B Tex. Jur., Par. 89, page 301. In Texas the rule also is that if a person "exercises no degree of care for his own safety, he may be said to be guilty of contributory negligence as a matter of law * * *." *Loughry v. Hodges (Tex. Civ. App., 1948), 215* S. W. 2d 669, paragraphs ('3-4') page 673, and other Texas cases cited by the Court in the Texas case cited in the opinion in this case [*United States Gypsum Co. v. Balfanz (5 Cir., 1951), 193 Fed. 2d 1*].

The Court of Appeals here properly followed the Texas law just as the court had followed the Texas law on the same subject in the *Balfanz* case just referred to and as they had found the Texas law to be in the more recent case of *Fain v. Goodyear Tire and Rubber Co., 5 Cir., 1956, 228 Fed. 2d 508, 511.*

THERE IS NO CONFLICT OF DECISION

Petitioner asserts that the Court of Appeals decision is in conflict with the decision of the Supreme Court of Texas in *McKee v. Patterson, 271 S. W. 2d 391*, to which we have heretofore made reference. The decision under review exactly follows and does not differentiate from the *McKee* case.

In the *McKee* case Patterson, the injured workman, was an employee of a subcontractor who was working under McKee, a general contractor. Patterson, a painter, was working on a slick gymnasium floor when the ladder from which he was working slipped, causing the fall to the floor and his resulting injuries. Mr. Patterson knew of the slick condition of the floor and, as here, appreciated the danger of working on it.

There the court held, as the Court of Appeals held here, that when the parties have knowledge of danger there is no duty to give warning of the danger so known, *271 S. W. 2d ex. p. 394*. Likewise, the Supreme Court of Texas in that case held as the Court of Appeals held in this case that one who voluntarily exposes himself to risk cannot recover for the injuries sustained therefrom.

The court's statement, quoted in the ~~opinion~~ PETITION for writ of certiorari, "while he (an invitee) may not close his eyes to obvious dangers he has a right to assume that the premises are safe ~~from~~ FOR his use," *271 S. W. 2d (par. 4-5) ex. p. 395*, has application to the rule which determined whether an invitee, as a matter of law, *should have known* of the dan-

gerous condition to which he exposed himself. The Texas Supreme Court decision makes clear that such quoted rule has no application in the instances where the invitee had actual knowledge of the danger with which he became involved. The court there, as here, emphasized that the personal knowledge which the injured workman had of his danger would operate to bar his right of recovery.

THE COURT OF APPEALS DECISION IS NOT AN AN INVASION OF THE PROVINCE OF THE JURY

The evidence was without dispute that Petitioner's place of work was safe when it was delivered to the contractor as a place to perform the conversion work which was to be done (R. 77). The place of the work remained safe (R. 80, 81). Petitioner testified his place of work did not cause the accident (R. 81). Consequently, there was no fact question which required jury determination on the one issue submitted to the jury under Petitioner's lone theory for recovery (R. 321-322). Besides, and as above presented, Respondent, as the employer of an independent contractor, under the law, was not required to furnish Petitioner, a contractor's employee, with a safe place to work, *Harrison v. Harrison (Tex. Civ. App., 1937), 100 S. W. 2d 780*, nor was Respondent required to protect Petitioner from injury caused by transitory conditions incident to the progress of the work. *Union Tank & Supply Co. v. Kelley (5 Cir. 1948), 167 Fed. 2d 811.*

There was no need to warn Petitioner of danger. Petitioner testified that he knew how dangerous it was to do

what he did. Petitioner testified that warning to him was not required to acquaint him with the knowledge of his peril (R. 68). As has been above presented, no issue of fact was present as to whether or not Petitioner took any care for his own safety. He admitted that he had not (R. 106).

There was no evidence in support of liability of Respondent to Petitioner. The Court of Appeals properly held "the matter was not for submission to the jury but should have been disposed of by an instructed verdict." In that holding the Court of Appeals did not violate any right conferred to Petitioner by the Seventh Amendment to the United States Constitution.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

A copy of the foregoing Brief in Opposition has been deposited in the United States Mail in Midland, Texas, in a properly stamped envelope addressed to Counsel at their respective post office addresses, as follows: Henry D. Akin, Jr., Esq., 505 North Ervay Street, Dallas 1, Texas; J. O. Bean, Esq., 10th Floor, Gulf States Bldg., Dallas 1, Texas; this the 14th day of September, 1956.

William L. Kerr

WILLIAM L. KERR

10/12

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RESPONDENT'S PETITION FOR REHEARING

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RESPONDENT'S PETITION FOR REHEARING

Respondent, Phillips Petroleum Company, prays that this Court grant rehearing of its order of October 22, 1956 (granting the petition for writ of certiorari, vacating the judgment of the Court of Appeals for the Fifth Circuit, and reinstating the judgment of the District Court), and further prays:

(a) that said order be vacated, that the case be transferred to the summary calendar for oral argu-

ment, and that upon final hearing, the judgment of the Court of Appeals be affirmed; or, in the alternative,

(b) that said order be amended by directing that the case be remanded to the Court of Appeals for further proceedings; or, in the alternative,

(c) that said order be amended by directing that the case be remanded to the District Court for new trial; and

(d) that, in any event, said order be amended so as not to reverse that portion of the judgment of the Court of Appeals in favor of respondent as against Traders and General Insurance Company;

on the following grounds:

1.

We cannot help but believe that this Court summarily disposed of this case as being merely one in which the Court of Appeals substituted its opinion for that of the jury on disputed issues of fact. It is not such a case. The Court of Appeals did not decide the case merely on the ground of contributory negligence as a matter of law; as its opinion shows, the principal basis for its decision and judgment was that under applicable decisions of the State Courts of Texas, the respondent had violated no duty to petitioner, this being a clear matter of substantive law. If this Court is to take jurisdiction of this case involving only Texas

law, it is respectfully but most earnestly urged that this Court has not fully performed its judicial function by summarily vacating the judgment of the Court of Appeals. The per curiam order will create confusion as to the law to be applied in similar cases in the Federal District Courts in Texas. The order may be interpreted as a direction to the lower federal courts not to follow the decisions of the Supreme Court of Texas on this matter of substantive law. At the very best, if this case stands in its present form, the Federal Courts in Texas must speculate on what rule of law they are expected to apply as to the duty owed by a landowner to an employee of an independent contractor. This quite conceivably could lead to different rules in the Federal Courts and the State Courts of Texas and as among Federal Courts in Texas. Respondent respectfully submits that, if it is to take a case of this nature, this Court should permit the filing of briefs and hear oral argument and then hand down its opinion setting forth the reasons for its decision on the merits of the case; otherwise, courts and counsel in other cases will not know in what respects the Court of Appeals has or has not erred.

2.

Although the case is a personal injury damage suit involving no federal question, it does involve fundamental questions of legal duty which are of the utmost importance to lower courts in the federal system in deciding an ever-increasing volume of similar litigation brought by the employee of an independent contractor (after receiving

workmen's compensation benefits from his employer as petitioner did here) against the contractee for injuries arising out of performance of the contract work. The various legal relationships giving rise to an affirmative duty to protect or warn (e.g. master-servant, owner-invitee, supplier-user), the scope of such duty, and the proper limits to such duty are matters that have received the careful consideration of both the Texas appellate courts and the Court of Appeals for the Fifth Circuit. This Court's order does not indicate whether the law to be applied in the federal courts in Texas is to be different from the Texas law as declared by the Supreme Court of Texas in *McKee v. Patterson*, *271 S. W. 2d 391 (1954)*, and other cited cases; whether the law of that case is applicable to the facts of the present case, as the Court of Appeals held it was; whether, or in what respects, the Court of Appeals has misconstrued or misapplied that decision; or whether the judgment of the Court of Appeals is vacated for some other reason. The order invites, even necessitates, speculation as to what this Court intended to hold and causes confusion by upsetting an apparently correct and thoroughly considered published opinion of the Court of Appeals without discussion of either the law or the evidence. A specific example is afforded by a supplemental brief, filed in a Texas appellate court three days after this Court's order, stating that the United States Supreme Court, in reversing the *Gibson* case, "struck down the doctrine in the *McKee* case." (*Nance Exploration Co. v. Texas Employers' Ins. Assn.*, cause number 5226 pend-

ing on the docket of the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas.)

3.

The decision of the Court of Appeals follows the Texas law on the questions presented and correctly applies the Texas law to the facts in evidence. The Supreme Court of Texas has not hesitated to render judgment for a defendant contrary to the jury verdict where the plaintiff's own testimony shows that he knew or should have known of the danger which caused his injury. *McKee v. Patterson*, supra. Nor has it hesitated to find contributory negligence as a matter of law. *Sergeant v. Williams, 258 S. W. 2d 787 (Tex. Sup. Ct. 1953)*. The Court of Appeals has rendered the same decision in this case as would have been rendered by the Supreme Court of Texas. Since the undisputed evidence shows that, as a matter of law, petitioner knew or should have known of the danger, there was no duty on respondent to warn him. Whatever might be the rule elsewhere, it is clear in Texas that this is a matter of substantive law on which the Supreme Court of Texas has spoken often and vigorously, as in the *McKee* case. Furthermore, petitioner's action is barred because he failed to exercise any care for his own safety and caused his own injury.

4.

The right of trial by jury does not require that effect be given to a verdict for the plaintiff that is contrary to the

plaintiff's own testimony, by which he is bound. The rule that the evidence must be viewed in the light most favorable to the verdict does not mean that the court should disregard the petitioner's own sworn admissions that, because of his experience in the oil fields, he knew that empty kerosene barrels were to be expected around any drilling well location (R. 67), that he knew it was dangerous to have a cutting torch around an empty kerosene barrel (R. 68) and that an explosion would probably occur (R. 68, 90), that he himself, and he alone, selected the barrel which exploded (R. 92), that he made no effort to determine the former contents of the barrel by either looking or smelling (R. 104), that he used the barrel without making any test of it (R. 106), showing that he exercised no care for his own safety. Lest there be any misunderstanding on this point, we repeat that petitioner himself testified that the barrel which exploded was selected and used by petitioner himself; that it was not the same barrel which respondent's employee had handed petitioner the afternoon before and which was a safe barrel; and that petitioner did not think at the time he selected the barrel or later that it was the same barrel he had been given the afternoon before (R. 92).

5.

If this Court's order is based on the duty of an employer to provide his employee a safe place to work, such as was involved in *Schulz v. Pennsylvania R. Co., 350 U. S. 523, 100 L. Ed. (Adv. Rep. No. 11), p. 430*, and *Anderson v. Atlantic Coast Line R. Co., 350 U. S. 807, 100 L. Ed. (Adv.*

Rep. No. 1), p. 47, then this Court has either misunderstood the undisputed facts here involved or has not followed the Texas decisions, because there was no employer-employee relationship between petitioner and respondent, and consequently, there could be no duty arising out of such a relationship. An entirely different duty is owed by an owner or occupier of land to an invitee upon the land. As stated by the Supreme Court of Texas in a recent decision, "The two fields of law are entirely separate, and they should be kept so." *Sears Roebuck & Co. v. Robinson, 280 S. W. 2d 238 (Tex. Sup. Ct. 1955)*. Petitioner has been paid compensation for his injuries as an employee of the contractor (R. 21). If he were respondent's employee, his action would be barred by the Workmen's Compensation Law of Texas. *Art. 8306, sec. 3, Vernon's Tex. Civ. Stats.; Bell v. Humble Oil & Ref. Co., 181 S. W. 2d 569 (Tex. Sup. Ct. 1944)*.

6.

If this Court's order is based on the duty of a supplier of a chattel for another's use to warn of its dangerous condition, *Restatement of Torts, sec. 388*, then this Court has affirmed the verdict and the District Court's judgment on a theory that was not submitted to the jury but was expressly rejected by the District Court and was not before the Court of Appeals. The complaint alleges that respondent was negligent in failing to furnish petitioner with reasonably safe equipment and in failing to warn petitioner of the unsafe condition of the drum (R. 5). The

District Court did not include this ground of recovery in the charge to the jury, and petitioner objected to the charge because of such failure (R. 328), such objection being overruled (R. 330). However, petitioner failed to appeal from the ruling and waived that alleged ground of recovery.

7.

The judgment of the Court of Appeals is correct for another reason which was not discussed in its opinion although point thereof was made before that Court. The only theory of liability submitted to the jury was failure to provide a safe place in which to work. The "place" of work was a perfectly safe piece of level ground. There is no evidence that it was unsafe. The condition of such place of work did not cause the accident. Petitioner himself testified that his place of work was safe (R. 77) and that the place of work did not cause his injury (R. 81). Yet, this Court's order reinstates the District Court's judgment which was based solely upon the jury finding that negligence in failing to provide a safe place of work was the cause of the injury (R. 321-322).

8.

The District Court's judgment that the intervenor, Traders and General Insurance Company (which had paid petitioner workmen's compensation benefits as the insurer of his employer), recover from this respondent the sum of $9,000.00, together with interest (R. 357), was reversed by the Court of Appeals, and that court rendered judgment

in favor of this respondent. Since Traders and General Insurance Company has filed no petition for writ of certiorari, this Court has no jurisdiction to reinstate the District Court's judgment in its favor.

9.

If this Court's order is not to be vacated, then it should be amended so as to remand the case to the Court of Appeals for further proceedings. Having rendered judgment on the grounds of no breach of duty and of contributory negligence, the Court of Appeals did not decide respondent's Point Two (proximate cause) or respondent's Point Five (erroneous charge). These points should be considered and decided before final judgment is entered. *Union Trust Co. v. Eastern Air Lines, 350 U. S. 962, 100 L. Ed. (Adv. Rep. No. 8), p. 307; Boudoin v. Lykes Bros. S. S. Co., 100 L. Ed. (Adv. Rep. No. 1), p. 48.*

10.

If the case is not to be remanded to the Court of Appeals, then it should be remanded to the District Court for new trial because of errors in the charge to the jury (see Brief for Appellant, Point Five, pages 36-38). The District Court instructed the jury to find for petitioner if they found that respondent failed to provide him a safe place in which to work (R. 321-322). Respondent objected to this instruction because it imposed a duty to warn and protect against dangers of which respondent did not know or which had not existed for sufficient time that it should have known

thereof (R. 331). *McKee v. Patterson*, supra. At best, the charge as a whole was confusing and contradictory. The District Court gave the jury conflicting versions of the law instead of reconciling the requested instructions and giving a clear and understandable charge, thus leaving to the jury the decision as to what rule of law to apply in reaching their verdict. Because of this error, the case should be remanded for retrial if the decision of the Court of Appeals is not affirmed.

For the above reasons, it is respectfully urged that this Court grant rehearing of its order and the further relief hereinabove sought.

Respectfully submitted,

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Attorneys for Respondent.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

I further certify that a copy of the foregoing Petition for Rehearing has been deposited at Midland, Texas, in a United States Post Office, with first class postage prepaid, addressed to counsel of record for petitioner Joe Gibson at their respective post office addresses, as follows: Henry D. Akin, Jr., Esq., 505 North Ervay Street, Dallas 1, Texas, and J. O. Bean, Esq., 10th Floor, Gulf States Building, Dallas, Texas, on this 7th day of November, 1956.

William L. Kerr

WILLIAM L. KERR

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MOTION FOR LEAVE TO FILE RECENT TEXAS COURT OPINION AS APPENDIX TO RESPONDENT'S PETITION FOR REHEARING

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE RECENT TEXAS COURT OPINION AS APPENDIX TO RESPONDENT'S PETITION FOR REHEARING

Respondent respectfully moves for leave to file the attached recent opinion of the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, at El Paso, as an appendix to respondent's petition for rehearing now pending in this case.

The opinion by the Texas court, which was rendered on November 21, 1956 (after filing of the petition for rehear-

ing in the case), supports the judgment of the Court of Appeals for the Fifth Circuit in this case in that the Texas court, applying the state law to very similar evidence, held that no fact issue was presented for jury determination.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the foregoing Motion and the attached Appendix has been deposited at Dallas, Texas, in a United States Post Office, with first class postage prepaid, addressed to counsel of record for petitioner Joe Gibson at their respective post office addresses, as follows: Henry D. Akin, Jr., Esq., 505 North Ervay Street, Dallas 1, Texas; and J. O. Bean, Esq., 10th Floor, Gulf States Building, Dallas, Texas, on this 27th day of November, 1956.

WILLIAM L. KERR.

APPENDIX TO RESPONDENT'S PETITION FOR REHEARING

No. 5211

COURT OF CIVIL APPEALS

EL PASO

JAVIER OAXACA,

Appellant,

v.

R. D. LOWMAN, d/b/a R. D. LOWMAN, CONTRACTOR,

Appellee.

Appeal from the District Court of El Paso County, Texas

OPINION

This is an appeal from a summary judgment rendered in favor of the defendant (appellee) by the Forty-First District Court of El Paso County, Texas. Appellant, Javier Oaxaca, had filed his action for damages against appellee-defendant, basing his action on injuries received while working as a plumber for one N. M. Canfield. Canfield had a sub-contract under the general contract of appellee to construct certain buildings at Fort Bliss, Texas. The Texas

Employers' Insurance Association filed its petition as intervenor to recover the sum of $4,477.75, which represented the sum paid plaintiff (appellant) under workmen's compensation benefits. The facts are as follows:

Plaintiff, as employee of sub-contractor Canfield (who had a plumbing, heating and ventilating contract under the general contractor, R. D. Lowman), was engaged in replacing a joint of pipe in the building being constructed by the general contractor. In order to get up to where the pipe was being detached from the connection, plaintiff picked up a large, loose crate which had been left nearby by another sub-contractor. He, the plaintiff, turned this crate up on end, so that it was 8 feet high and about 18 inches thick, then climbed up a nearby ladder and stepped over on to the crate to receive the joint of pipe from an assistant, who was stationed up in the rafters, or beams. Plaintiff testified that he weighed 210 pounds, and the piece of pipe weighed approximately 50 pounds. While standing on this crate, which the plaintiff says was empty, and while handling the piece of pipe, the crate tipped over and he fell, sustaining injuries of which he complains.

Defendant filed his motion and affidavit for summary judgment. Depositions of plaintiff and defendant's superintendent were filed. The court granted this motion. After the summary judgment had been granted, plaintiff filed a motion for a new trial and attached an affidavit thereto.

Appellant charges error, stating that the trial court erred in finding and holding, as a matter of law, that there

was no genuine issue, except as to the amount of damages, as to any material fact, and that defendant-appellee was entitled to judgment as a matter of law.

We think that appellant's point of error must be overruled. This being a summary judgment case, we are obliged to give the evidence and the inferences therefrom the most favorable aspect reasonably possible with reference to plaintiff's case, and discard contrary evidence and inferences. Even so, we feel that the reasoning and rulings found in *Robert E. McKee, General Contractor, Inc. v. Patterson, 271 S. W. 2d 391*, controls the disposition of the cause before us.

Plaintiff urges that because the general contractor was required by his contract to keep the premises free and clear from rubbish and debris, that he was, therefore, liable to plaintiff because another sub-contractor had left this crate on the premises. We find that the presence of the empty crate, even though it may have been left for two days or more, under the circumstances did not proximately cause the plaintiff's injuries. As is evident from the record and the depositions filed therein, the plaintiff preferred to pick up, move over into position, and use the crate, rather than use a ladder and a movable scaffold that were nearby and available and were there for the purpose of being used as needed. The proximate cause of plaintiff's injuries, then, was his deliberate and calculated rejection of the movable scaffold and putting to an unintended and unforeseeable use the empty crate. The record shows that plaintiff testified that it would have taken a little longer to take down

and use the movable scaffold, so instead he picked up the empty crate and, after some discussion between himself and a workman named Puga, stationed upon the beams or rafters, decided that the crate would serve his purpose; and, although he, the plaintiff, assured Puga that the crate was safe, he did ask one Rivera, another workman, to hold it while he was up on it. It cannot be said, then, that the proximate cause of plaintiff's injuries was the mere presence of the crate. It was the unusual and unforeseeable use to which plaintiff put it. In other words, plaintiff had a safe place to work, but deliberately rejected it.

Nor could the general contractor have foreseen that the crate would be put to any such use as was done by plaintiff. His affidavit shows that plaintiff's immediate employer (sub-contractor) was required to furnish the necessary scaffolds and ladders for his men. The record shows that such was available, but was rejected by plaintiff after an intelligent and considered choice. Therefore, we do not think the results could have been reasonably foreseen by general contractor.

It is also obvious from the record that the danger in using the crate in the way he did was as obvious to plaintiff as it could have been to defendant, the general contractor. This was not a concealed danger, as was found in the *Henger* case *(Smith v. Henger, 226 S. W. 2d 425)*. Plaintiff in his deposition reveals that he had considered the danger in using the crate and had tried to alleviate it, at least to some extent, by having the workman, Rivera, stand at the bottom of the crate and hold it steady; so here

we have a risk that is as open and obvious to the plaintiff as it could be or was to the general contractor.

It is also inescapable, due to the circumstances here present, that plaintiff here deliberately and voluntarily assumed the risks attendant to using the crate in the manner he did. Nobody told him to do it, and his deposition shows that he discussed it with the workman who was up in the rafters or beams. Plaintiff's injuries did not result from the passive presence of a hazard similar to the elevator shaft, in the *Triangle Motors* case *(Triangle Motors of Dallas v. Richmond, 258 S. W. 2d 60)*, or the presence of the shaft in the *Henger* case. Plaintiff here, by his own affirmative action, created his own hazard and then voluntarily assumed the risks attendant thereto.

Lastly, it is clear that plaintiff, by creating his own hazard and then using it, was guilty of contributory negligence as a matter of law. The scaffold was nearby and available; the risk was open and obvious to plaintiff; and yet he rejected the scaffold, prepared the crate for the use to which he put it, and, after discussion as to its safety, climbed up on it and was injured while thereon.

Having found that there were no genuine issues of fact presented by the record, it follows, therefore, that the trial court was correct in granting summary judgment in favor of the defendant:

James v. M. K. & T. R.R. Co., 182 S. W. 2d 921;

Robt. E. McKee, Gen. Cont., Inc. v. Patterson, 271 S. W. 2d 391;

Smith v. Henger, 226 S. W. 2d 425;

Triangle Motors of Dallas v. Richmond, 258 S. W. 2d 60.

The affidavit filed by plaintiff, and attached to his motion for a new trial, came too late, as the court is charged with the duty only of considering the record as it appears before the court at the time of the hearing of a motion for summary judgment:

Rule 166-A, Texas Rules of Civil Procedure;

Haley v. Nickels, 235 S. W. 2d 683;

Fowler v. Tex. Emp. Ins. Assn., 237 S. W. 2d 373.

Appellant's point is therefore overruled, and the decision of the trial court in all things affirmed.

/s/ ALAN R. FRASER

Alan R. Fraser, *Associate Justice*

Filed: Nov. 21, 1956.

OCTOBER 22, 1956.

Decisions Per Curiam.

No. 339. GIBSON *v.* PHILLIPS PETROLEUM CO. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the judgment of the District Court is reinstated. MR. JUSTICE REED and MR. JUSTICE BURTON would deny certiorari. MR. JUSTICE FRANKFURTER has filed a dissent in which MR. JUSTICE HARLAN joins. *Henry D. Akin, Jr.* for petitioner. *Rayburn L. Foster, Harry D. Turner* and *William L. Kerr* for respondent. Reported below: 232 F. 2d 13.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE HARLAN joins, dissenting.

This is an ordinary suit for damages for injuries claimed to have been caused by defendant's fault. Doubtless hundreds upon hundreds of such suits are constantly brought in the state courts of Texas. This suit is brought in a federal court because the plaintiff is a citizen of Texas and the defendant corporation is, in the eyes of the law, a citizen of Delaware. The federal court in a case like this is deemed to be a state court of Texas,* and the law by which the plaintiff's rights are to be determined is exclusively Texas law. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. No federal law, statute or decisional, is remotely involved. These diversity litigations place, it is becoming increasingly recognized, an undue burden upon the federal courts in their ability to dispose expeditiously of other litigation which can be properly brought only in

*". . . a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State . . . ." *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 108.

the federal courts. Very often litigants in the position of the plaintiff bring a suit involving merely local law in a federal court because for one reason or another they expect a more favorable outcome than if the suit were tried in the local courts. See *Lumbermen's Mutual Casualty Co.* v. *Elbert*, 348 U. S. 48, 53 (concurring opinion).

This case was tried before a jury, which found for the plaintiff. Defendant appealed to the Court of Appeals for the Fifth Circuit. While the particular judges who heard the case are not from Texas, they are, however, constantly charged in such cases as this with the task of being conversant with, and applying, Texas law. The Court of Appeals held that, as a matter of Texas law, the District Court committed error in not directing a verdict for the defendant. It reversed the judgment of the District Court and rendered judgment for the defendant. Plaintiff then sought a writ of certiorari to review the judgment of the Court of Appeals.

This Court cannot determine whether the Court of Appeals was right or wrong in its judgment without determining whether on this record the case should or should not have been left to the jury. That can only be decided on the basis of an investigation of Texas law. This Court is not a court to determine the local law of the forty-eight States. Error on the part of a Court of Appeals in applying the local law of any one of the forty-eight States involves injustice to a particular litigant, whether it is a personal injury case or any other case. If the claim of injustice in a particular case arising solely out of diversity jurisdiction justifies review by this Court, it justifies it in every case in which on a surface view of the record this Court feels a Court of Appeals may have been wrong in its ascertainment of local law.

In taking one of these cases, encouragement doubtless is given to seek this Court's review in other like cases.

But Congress sought to relieve this Court of the burden of such cases when it established the Courts of Appeals in 1891. This Court has respected the purpose of that enactment by stating again and again that it does not sit to correct errors, even a plain error, in a particular case, especially one involving a local controversy of this sort. The Supreme Court of the United States is designed for important questions of general significance in the construction of federal law and in the adjustment of the serious controversies that arise inevitably and in increasing measure in a federal system like ours. These questions are more than sufficient in volume and difficulty to engage all the energy and thought possessed by the Court; it should not be diverted by the correction of errors in local controversies turning on particular circumstances.

The Court's consideration of a case like this and the encouragement given for similar demands upon the Court are, in my deep conviction, so inimical to the effective discharge of the true functions of this Court that I cannot abstain from expressing my dissent from the Court's entertainment of the petition for certiorari.